

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte

PATRICK ROONEY CONARRO, MARC ANTHONY ARTERITANO,
CHARLES WALKER CONARRO, and RICHARD DEAN SOAT

Appeal 2007-2969
Application 10/782,237
Technology Center 3700

Decided: December 12, 2007

Before DONALD E. ADAMS, LORA M. GREEN, and NANCY J. LINCK,
Administrative Patent Judges.

ADAMS, *Administrative Patent Judge.*

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 1-20, the only claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b).

INTRODUCTION

The claims are directed to a combination meal serving tray. Claim 1 is illustrative:

1. A combination meal serving tray, comprising:
 - a substantially pear shaped housing having a pair of legs;
 - a food well formed in the housing; and
 - a cup well formed in the housing acting [as] a third leg to hold the tray off the ground.

The Examiner relies on the following prior art references to show unpatentability:

MacGregor	US 3,941,237	Mar. 2, 1976
Williamson	US 4,399,668	Aug. 23, 1983
Pace	US 5,259,528	Nov. 9, 1993
de Chollet	US 5,482,095	Jan. 9, 1996
Panta Chica	US D398,480	Sep. 22, 1998
Chantaca	US 5,857,583	Jan. 12, 1999
Howell	US 5,921,423	Jul. 13, 1999
Cinque	US 6,702,141 B1	Mar. 9, 2004
Wright	US D489,579 S	May 11, 2004

The rejections as presented by the Examiner are as follows¹:

1. Claims 1-6, 10, 13, and 15-19 stand rejected under 35 U.S.C. § 103 as unpatentable over the combination of Pace or Panta Chica in view of Cinque.

¹ We recognize the Examiner's objection to claim 20 (Final Rej. 2) and Appellants' argument in response to this objection (Br. 17). The Examiner correctly points out, however, that this "is a petitionable matter rather than an appealable matter" (Answer 2). Accordingly, we do not consider this objection as part of our deliberations.

2. Claims 7-9 stand rejected under 35 U.S.C. § 103 as unpatentable over the combination of Pace or Panta Chica in view of Cinque, Chantaca, Wright and Howell.
3. Claims 11, 12, and 14 stand rejected under 35 U.S.C. § 103 as unpatentable over the combination of Pace, Panta Chica, Cinque, Chantaca, Wright and Howell.
4. Claim 20 stands rejected under 35 U.S.C. § 103 as unpatentable over the combination of Pace, Panta Chica, Cinque, de Chollet, Williamson and MacGregor.

We reverse the rejection of claims 3 and 15-19 under 35 U.S.C. § 103 as unpatentable over the combination of Panta Chica in view of Cinque. We reverse the rejection of claims 4-10 and 13 under 35 U.S.C. § 103 as unpatentable over the combination of Pace in view of Cinque. We affirm all other grounds of rejection.

DISCUSSION

Claims 1-6, 10, 13, and 15-19 stand rejected under 35 U.S.C. § 103 as unpatentable over the combination of Pace or Panta Chica in view of Cinque. Appellants have provided separate arguments for claims 3-6. While Appellants separately argue claims 10 and 15, the arguments are the same as those for claims 3 and 4 respectively. Accordingly, the following groups of claims will be separately discussed: I. claims 1 and 2; II. claims 3 and 15-19; III. claims 4, 10, and 13; IV. claim 5; and V. claim 6. 37 C.F.R. § 41.37(c)(1)(vii). Therefore, we limit our discussion to representative claims 1, 3, 4, 5, and 6.

Claim 1:

Claim 1 is drawn to a combination meal serving tray. The tray comprises three elements:

1. a substantially pear shaped housing having a pair of legs;
2. a food well formed in the housing; and
3. a cup well formed in the housing acting as a third leg to hold the tray off the ground.

Pace teaches “[a] stackable combination party tray for food, drink, utensils and napkins” (Pace Abstract). Pace’s tray has “two or more recessed food compartments” and a “recessed compartment for holding a plurality of sizes of beverage containers” (*id.*). Pace’s “tray is pentagon shaped with the utensil/napkin receptacles being provided at two corners of the pentagon opposite the beverage container receptacle. This provides the desired three-point or tripod support of the tray when the tray is set down on a support surface” (Pace, col. 2, ll. 6-11). Thus, Pace’s tray has a pair of legs and a cup well that acts as a third leg.

Panta Chica teaches a serving tray. We direct attention to Figure 1 of Panta Chica.

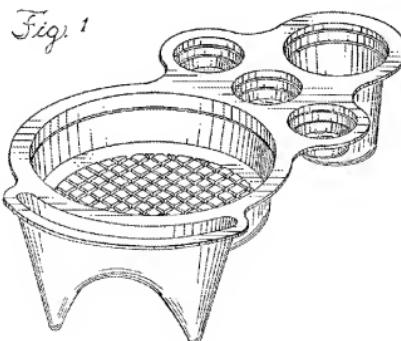


FIG. 1 is a perspective view of Panta Chica's serving tray (Panta Chica, col. 2, ll. 6-7). As illustrated in figure 1, Panta Chica's tray comprises three elements:

1. a housing having a pair of legs;
2. a food well formed in the housing; and
3. a cup well formed in the housing acting as a third leg to hold the tray off the ground.

The Examiner finds that each of Pace and Panta Chica teach Appellants' claimed invention "except for the precisely pear shape of the top view profile of the meal serving tray" (Answer 5). The Examiner relies on Cinque to make up for this deficiency in each of Pace and Panta Chica.

Cinque teaches a pear-shaped serving tray (Answer 5). For clarity, we direct attention to figure 2 of Cinque.

FIG. 2

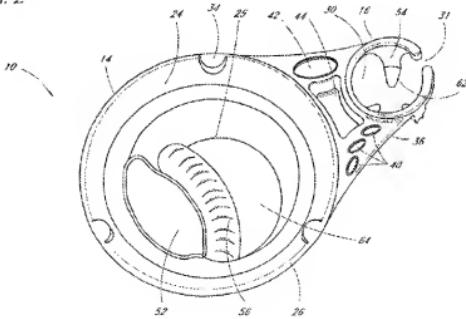


Fig. 2 is an angled top view of one embodiment of the refreshment center (Cinque, col. 2, ll. 5-6).

Based on this evidence, the Examiner finds that it would have been *prima facie* obvious to a person of ordinary skill in the art to modify either of Pace or Panta Chica's serving trays to a substantially pear-shape configuration as taught by Clinque (Answer 5). We find no error in the Examiner's *prima facie* case of obviousness. A minor modification of the prior art, such as limiting the device to a particular shape, does not distinguish the claimed product from the prior art. *See KSR*, 127 S. Ct. 1727, 1741 (2007) (It is proper to "take account of the inferences and creative steps that a person of ordinary skill in the art would employ."). *See also id.* at 1742 ("A person of ordinary skill is also a person of ordinary creativity, not an automaton.").

In response, Appellants assert that the trays taught by Pace and Panta Chica do "not stack efficiently in the horizontal direction" and are "not pair [sic] shaped" (Br. 12). There is, however, no requirement in claim 1 that the tray stack efficiently in any direction. Accordingly, we are not persuaded by this argument. Further, while Pace and Panta Chica do not teach a pear-shaped tray, the Examiner relies on Cinque to teach this limitation. Appellants argue that Cinque does not have a "food well formed in the housing or three legs where the cup well acts as the third leg" (*id.*). This is, however, taught by Pace and Panta Chica. Nevertheless, Appellants assert that the Examiner "is just picking and choosing elements of each reference to recreate the claim after the fact" (*id.*). We are not persuaded by Appellants' argument. "The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *KSR*, 127 S. Ct. at 1739. Here, Appellants claim a serving tray that has all the elements of Pace and Panta Chica except for a

particular shape. The Examiner has demonstrated that those of ordinary skill in the art would appreciate that the specific shape Appellants have selected for their tray, was known in the art. Cinque expressly teaches that the pear-shape configuration allows the tray to avoid occupying additional unnecessary area (Cinque, col. 3, ll. 23-24). While Appellants assert that Cinque is not a “tray in the conventional sense”, the preponderance of the evidence on this record suggests that it would have been obvious to modify the trays taught by Pace and Panta Chica to have the shape taught by Cinque with the expectation of having a tray that did not take up unnecessary area.

For the foregoing reasons we affirm the rejection of claim 1 under 35 U.S.C. § 103 as unpatentable over the combination of Pace or Panta Chica in view of Cinque. Claim 2 falls together with claim 1.

Claim 3:

Claim 3 ultimately depends from and further limits the cup well of claim 1 to have a plurality of compressible ribs. The Examiner finds that Pace’s “cup well has structural ribs 19 and compressible ribs 17” (Answer 4). Appellants assert that Panta Chica and Cinque do not teach a cup well with compressible ribs. As to Pace, Appellants assert that Pace teaches that Pace’s element 19 are ribs whereas element 17 is not a rib (Br. 13).

According to Pace, “the beverage container receptacle has preferably two protrusions 17 that are tear-shaped. The effect of these protrusions is to cam or wedge a beverage container, such as a cup or bottle toward the opposite side of the receptacle side wall 12A from which the protrusions 17 extend” (Pace, col. 2, l. 64 - col. 3, l. 4). The Examiner finds that element 17 is an elongated tear-shaped protrusion, which is by definition a rib

(Answer 8). We find that the Examiner has the better argument.

Accordingly, we affirm the rejection of claim 3 under 35 U.S.C. § 103 as unpatentable over the combination of Pace in view of Cinque. Claims 15-19 fall together with claim 3. Since the Examiner does not dispute Appellants' assertion that Panta Chica does not teach a cup well having a plurality of compressible ribs we reverse the rejection of claims 3 and 15-19 under 35 U.S.C. § 103 as unpatentable over the combination of Panta Chica in view of Cinque.

Claim 4:

Claim 4 depends from and further limits the tray of claim 1 to have an arch in a bottom of the food well. The Examiner finds that Panta Chica teaches a food well that has an arch at the bottom of the forwardmost compartment and "is best seen in Panta Chica figures 1 and 12 (Answer 5). For illustrative purposes we reproduce Panta Chica's figures 3 and 12 below:

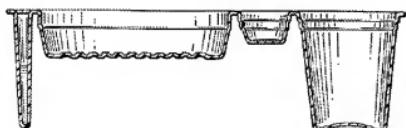


Fig. 3

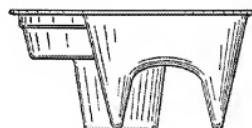


Fig. 12

"FIG. 3 is a sectional view along 3-3 as shown in FIG. 2 thereof;" and "FIG. 12 is a detailed top view of the surface of the bottom of the larger well" (Panta Chica, col. 1, ll. 9-10 and 24-25). Appellants argue that the arched well illustrated in Fig. 12 and appears on the left of Fig. 3 is not a food well (Br. 13). Appellants, however, fail to explain why a person of ordinary skill

in the art would not consider this compartment to be a food well. As the Examiner explains, “the crescent shaped compartment is capable of holding seeds, raisins, chips or crackers” (Answer 8). We find the Examiner has the better argument.

Accordingly, we affirm the rejection of claim 4 under 35 U.S.C. § 103 as unpatentable over the combination of Panta Chica in view of Cinque. Claims 10 and 13 fall together with claim 4. Since the Examiner does not dispute Appellants’ assertion that Pace does not teach an arched food well (Br. 13), we reverse the rejection of claims 4, 10, and 13 under 35 U.S.C. § 103 as unpatentable over the combination of Pace in view of Cinque.

Claim 5:

Claim 5 depends from claim 4 and requires that the food well has a cutout at an end of the arch. The Examiner finds that Panta Chica’s arched food well has a cutout that is at the outwardly concave curve at the upper end of the arch (Answer 5). In response Appellants assert that since prior art fails to teach an arch “they cannot show a cutout in the arch” (Br. 14). We disagree. As explained in the above discussion of claim 4, Panta Chica teaches a food well with an arch. The Examiner has explained that this same reference teaches a cutout in the upper end of the arch. Accordingly, we affirm the rejection of claim 5 under 35 U.S.C. § 103 as unpatentable over the combination of Panta Chica in view of Cinque. Since the Examiner does not dispute Appellants’ assertion that Pace does not teach an arched food well with an arch (Br. 14), we reverse the rejection of claim 5 under 35 U.S.C. § 103 as unpatentable over the combination of Pace in view of Cinque.

Claim 6:

Claim 6 depends from and further limits claim 1 to require that the food well has a lip along a top edge. The Examiner finds that Panta Chica teaches “[a]n outwardly extending lip . . . formed along a top edge” of the tray (Answer 5). In response Appellants direct attention to Appellants’ figures 1 and 3, which according to Appellants illustrate a tray, which has a lip 30 along the top edge of a food well that is designed to receive a lid 28 (Br. 14). We are not persuaded by Appellants’ argument. Claim 6 places no requirement on the structure of the lip other than that it is along the top edge of a food well. The preponderance of evidence on this record supports the Examiner’s position.

Accordingly, we affirm the rejection of claim 6 under 35 U.S.C. § 103 as unpatentable over the combination of Panta Chica in view of Cinque. Since the Examiner does not dispute Appellants’ assertion that Pace does not teach a food well that has a lip along a top edge (Br. 14), we reverse the rejection of claim 6 under 35 U.S.C. § 103 as unpatentable over the combination of Pace in view of Cinque.

Claims 7-9 stand rejected under 35 U.S.C. § 103 as unpatentable over the combination of Pace or Panta Chica in view of Cinque, Chantaca, Wright and Howell. Since Appellants do not separately argue these claims, they will stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Claim 7 is representative. Claim 7 depends from and further limits claim 6 to include a lid that fits over the lip. The Examiner relies on the combination of Pace or Panta Chica in view of Cinque as discussed above and finds that the combination does not teach a lid (Answer 6). The Examiner relies on

Chantaca, Wright, and Howell to make up for this deficiency in the combination of Pace or Panta Chica in view of Cinque (Answer 6).

According to the Examiner, “[i]t would have been obvious to add a lid in order to protect the food well compartments from contamination to preserve the freshness, taste and hygiene of the food” (*id.*).

Appellants only argument in response is that “[c]laims 7-9 are allowable as being dependent upon an allowable base claim” (Br. 16). We are not persuaded because the rejection of claim 6 under 35 U.S.C. § 103 as unpatentable over the combination of Panta Chica in view of Cinque is affirmed. Accordingly, we affirm the rejection of claim 7 under 35 U.S.C. § 103 as unpatentable over the combination of Panta Chica in view of Cinque, Chantaca, Wright and Howell. Claims 8 and 9 fall together with claim 7.

However, because the rejection of claim 6 under 35 U.S.C. § 103 as unpatentable over the combination of Pace in view of Cinque was reversed; we reverse the rejection of claims 7-9 under 35 U.S.C. § 103 as unpatentable over the combination of Pace in view of Cinque, Chantaca, Wright and Howell.

Claims 11, 12, and 14 stand rejected under 35 U.S.C. § 103 as unpatentable over the combination of Pace, Panta Chica, Cinque, Chantaca, Wright and Howell. Since Appellants do not separately argue these claims, they will stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Claim 11 is representative. Claim 11 depends from claim 10. Claim 11 is drawn to a combination meal serving tray that comprises 5 elements:

1. a pear shaped housing having a pair of legs;

2. a drink well formed in the housing opposite the pair of legs, forming a third leg;
3. a first food well formed in the housing having an arm impression formed in a bottom of the first food well;
4. a second food well formed in the housing; and
5. a lid that fits over the first food well.

The Examiner finds that the combination of Pace, Panta Chica, and Cinque teach the requirements of claim 11 with the exception of a lid (Answer 6). To make up for this deficiency, the Examiner relies on Chantaca, Wright and Howell (*id.*). Appellants only argument in response is that “[c]laims 11, 12 & 14 are allowable as being dependent upon an allowable base claim” (Br. 16). However, the rejection of claim 10 under 35 U.S.C. § 103 as unpatentable over the combination of Pace in view of Cinque is affirmed. Accordingly, we affirm the rejection of claim 11 under 35 U.S.C. § 103 as unpatentable over the combination of Pace, Panta Chica, Cinque, Chantaca, Wright and Howell. Claims 12 and 14 fall together with claim 11.

Claim 20 stands rejected under 35 U.S.C. § 103 as unpatentable over the combination of Pace, Panta Chica, Cinque, de Chollet, Williamson and MacGregor. Claim 20 is drawn to a combination meal serving tray. The tray comprises three elements:

1. a housing having a pair of legs, wherein there is an opening between the pair of legs;
2. a drink well formed in the housing having a plurality of compressible ribs; and

3. a food well formed in the housing.

Claim 20 also requires that the tray is formed of plastic and the compressible ribs have a thickness that is less than the rest of the housing.

The Examiner finds that the combination of Pace, Panta Chica, and Cinque teach the requirements of claim 20 with the exception of the thickness of the compressible rib (Answer 7). To make up for this deficiency, the Examiner relies on de Chollet, Williamson and MacGregor (*id.*).

Appellants only argument in response is that “[c]laim 20 is allowable as being dependent upon an allowable base claim” (Br. 17). We are not persuaded. Claim 20 depends from claim 15. The rejection of claim 15 under 35 U.S.C. § 103 as unpatentable over the combination Pace in view of Cinque is affirmed. Accordingly, we affirm the rejection of claim 20 under 35 U.S.C. § 103 as unpatentable over the combination of Pace, Panta Chica, Cinque, de Chollet, Williamson and MacGregor.

CONCLUSION

In summary, we affirm the following rejections under 35 U.S.C. § 103: claims 1 and 2 over Pace or Panta Chica in view of Cinque; claims 3 and 15-19 over Pace in view of Cinque; claims 4-6, 10 and 13 over Panta Chica in view of Cinque; claims 7-9 over Panta Chica in view of Cinque, Chantaca, Wright, and Howell; claims 11, 12, and 14 over the combination of Pace, Panta Chica, Cinque, Chantaca, Wright, and Howell; and claim 20 over the combination of Pace, Panta Chica, Cinque, de Chollet, Williamson, and MacGregor.

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We reverse the rejection of claims 3 and 15-19 under 35 U.S.C. § 103 as unpatentable over the combination of Panta Chica in view of Cinque. We reverse the rejection of claims 4-10 and 13 under 35 U.S.C.

§ 103 as unpatentable over the combination of Pace in view of Cinque.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

Ssc:

LAW OFFICE OF DALE B. HALLING, LLC
655 SOUTHPOINTE CT, SUITE 100
COLORADO SPRINGS, CO 80906